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Book Review: Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles, by Moffatt Hancock

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Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles. By MOFFATT HANCOCK. Foreword by Bora Laskin and Introduction by David F. Cavers. Buffalo: William S. Hein Company. 1984. Pp. xviii,446. (\$45.00).

In 1942 Professor Hancock published *Torts in the Conflicts of Laws* which at that time was hailed as one of the most progressive monographs ever published in the field of the conflict of laws. By recognizing the role of social policy in solving cases that involve at least one relevant foreign element he anticipated the new methodologies proposed by Currie,¹ Cavers² and the Restatement of the Law Second, Conflict of Laws 2d.³ During the next forty years, Professor Hancock continued his search for a satisfactory new methodology of his own. The thirteen articles reproduced in the book under review represent the product of his inquiring mind. In these articles he rejected the traditional classificatory approach with its many

² *Idem*, pp. 220,221.

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¹ *Selected Essays on the Conflict of Laws* (1963).

² *The Choice of Law Process* (1965).

³ (1971).

escape devices and its ignorance of the policies of particular domestic rules and proposed a policy controlled methodology which, in fact, amounts to a "better law approach".⁴

From a Canadian point of view, chapters 7⁵ and 8⁶ are among the most interesting ones as they enable the readers to understand the "American Revolution" in the conflict of laws, which resulted in the liberation from the shackles of tradition, and to see what are the alternatives to the rule in *Phillips v. Eyre*,⁷ as interpreted by *Machado v. Fontes*,⁸ which is still followed by our courts.⁹ Fearing that the state policy and interest analysis adopted in the United States might be considered too radical by most Canadian lawyers, and in this he has been proven right,¹⁰ he argued that, in cases where the potentially relevant domestic rule of foreign law had been embodied in a statute, the choice issue presents nothing more radical than a question of statutory construction.¹¹

In a purely domestic case, where a statute is relied upon, the judge must determine to what extent the policy of the statute requires that it override the policies of existing decisional rules or statutes. In a choice case he must determine to what extent the policy of the forum statute (relied upon by one party) conflicts with the policy of another state's decisional rule or statute.

Re-reading Professor Hancock's articles are of great value at a time when the Law Commission and the Scottish Law Commission have just published their proposals on choice of law in tort and delict.¹² The Commissioners are in favour of the abolition of the traditional common law rule and propose that it be replaced by one or another of two alternatives. The first alternative is to apply the law of the country where the tort or delict occurred, subject to a single general exception in favour of the law of the country with which the occurrence and the parties had at the time of the occurrence the closest and most real connection if the occurrence and the parties had an insignificant connection with the country where the tort or delict occurred.¹³ This, in my opinion, is an excellent proposal. It

⁴ See Prologue, p.xiii, and Chapter 1, Three Approaches to the Choice-of-Law Problem, p. 1.

⁵ Canadian-American Torts in Conflicts of Laws: The Revival of Policy-Determined Construction Analysis, p. 179.

⁶ Torts Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older Cases Revisted, p. 205.

⁷ (1870), L.R. 6 Q.B. 1 (Exch. Ch.).

⁸ [1897] 2 Q.B. 231 (C.A.).

⁹ See J.-G. Castel, *Canadian Conflict of Laws* (2nd ed., 1985), paras. 470-472.

¹⁰ The Tentative First Draft of a Foreign Torts Act prepared by Dr. H.E. Read for the Uniform Law Conference of Canada was never adopted by that body. See 1966 Proceedings, p. 58.

¹¹ P. xvi.

¹² The Law Commission Working Paper No. 87 and the Scottish Law Commission, Consultative Memorandum No. 62, *Private International Law, Choice of Law in Tort and Delict* (1984).

¹³ Para. 7.2.

would achieve certainty and predictability and at the same time overcome the criticism addressed to the exclusive application of the law of the place of tort or the existing double actionability rule. The second alternative is to apply the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection. In order to facilitate the search for this country, rebuttable presumptions are established in the case of personal injury and damage to property, death and defamation.¹⁴ It seems to me that this model would create great uncertainty, even with the help of presumptions, as too much freedom is given to the judge hearing the case.

The Commissioners also propose that the parties be allowed, before or after a tort or delict has occurred, to agree by means of contract what law should govern the parties' mutual liability in tort or delict subject to a reservation in favour of public policy.¹⁵ This proposal is long overdue. However, in practice, it may be difficult to reach such an agreement after a tort or delict has occurred. I doubt that Union Carbide would agree to have the law of Connecticut apply to the Bhopal disaster. Except in certain cases, it is also most unlikely that the parties to a tort or delict could agree as to the applicable law *before* its occurrence. Where such a choice takes place, it alleviates the shortcomings of the judicial search for the law of the country that has the closest and most real connection with the occurrence and the parties. One may ask whether the parties should be free to choose any law?

Professor Hancock's book is attractively bound and clearly printed. Its value is enhanced by the existence of a table of cases, a bibliography and a short subject index. It is a fitting tribute to a great scholar.

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¹⁴ *Ibid.*

¹⁵ Para. 7.3.

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